83-711

NO.

Office-Supreme Court, U.S.
FILED
OCT 29 1983
ALEXANDER L. STEVAS,

IN THE

Supreme Court of the United States

October Term, 1983

CLAY NIFONG, Petitioner,

v.

UNITED STATES OF AMERICA, Respondent.

PETITION FOR A WRIT OF CERTIORARI

TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

I. Whether the actions of an undercover agent of the United States Department of Agriculture who provided a tobacco farmer with counterfeit marketing cards and then told the farmer to sell tobacco by using the cards, unlawfully contrived the situation for prosecuting the farmer under 18 U.S.C. Section 1001 either as a matter of statutory construction, federal jurisdiction, or due process of law?

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OPINIONS BELOW

This case was argued before a three-judge panel of the United States Court of Appeals for the Fourth Circuit on Friday, June 10, 1983. This case was set as the fourth matter for hearing on a Friday morning. When it came up for argument after three prior lengthy arguments, the court appeared to have little interest or time to hear appellant's contentions. This is revealed by the Unpublished Opinion included herewith which does not address the issues of contrived federal jurisdiction, statutory construction or due process which were argued to the trial court and to the

Fourth Circuit; rather the Fourth Circuit decided the matter in short shrift saying it was not an entrapment situation. Petitioner's contentions go far beyond traditional entrapment. A copy of the Fourth Circuit Opinion is set out in full in the Appendix. Motion for Stay of Mandate was denied by the Fourth Circuit on September 22, 1983. Petition for Rehearing was previously denied.

JURISDICTION

The Petitioner seeks review of the judgment of the United States Court of Appeals for the Fourth Circuit dated August 18, 1983 confirming a conviction in the United States District Court for the Middle District

of North Carolina for two counts of 18 U.S.C. § 1001. Jurisdiction is conferred upon this Court by 28 U.S.C. § 1254 (1) (1976).

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

U. S. Constitution, Amendment V:

> No person ...shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law...

18 U.S.C. § 1001:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and wilfully falsifies, conceals, or covers up by any trick, scheme or devise any material fact, or makes any false, fictitious, or fraudulent statements or representations, or makes or uses any false writing or

document knowing the same to contain any fales, fictitious or fraudulent statement or entry, shall be fined not more than $10,000.00 or imprisoned not more than five years, or both.

STATEMENT OF THE CASE

On August 30, 1982, the petitioner was indicted on two counts charging violations of 18 U.S.C. 1001. A jury trial began September 13, 1982 before Judge Richard Erwin in Greensboro, North Carolina. The government called two witnesses: the first an employee of the North Carolina Agricultural Stabilization and Conservation Service; the second was Jay Bee Collins, an agent of the United States Department of Agricultural. The defendant presented no evidence. The jury

returned verdicts of guilty on both counts. The evidence introduced at trial is summarized as follows:

In the fall of 1981 during tobacco season, Jay Bee Collins, an employee of the United States Department of Agriculture, decided to act in an undercover capacity, posed as a farmer, and presented himself at Grower's Tobacco Warehouse in the Winston-Salem area while tobacco marketing was underway. Mr. Collins had obtained some government purchased tobacco which he resold at Grower's Warehouse in October, 1982 representing the tobacco to have been grown by him on his farm. To further his undercover procedures, Jay Bee Collins manufactured two

tobacco marketing cards issued in the pseudonymes James Collins and James Barr. These cards were issued on fictitiously numbered, non-existent Rockingham County farms authorizing sales of 10,000 and 16,457 tobacco pound quotas, respectively. On October 19th and October 28, 1981, Collins posed as a farmer and sold the government tobacco as his own at Grower's Warehouse. After his October 28th sale, Collins announced to individuals on the warehouse floor that "I was just about through with my tobacco and was looking for someone that might be interested in using some of the pounds from my card." At this time, Collins met tobacco farmer Clay Nifong. Collins did not know Clay

Nifong until they met on the warehouse floor on October 28, 1981. Moreover, Collins did not go to Grower's Warehouse to investigate Clay Nifong.

Collins proceeded to tell Clay Nifong that he was a young, down and out farmer who had produced a poor tobacco crop and was in need of money for Christmas. Collins told Nifong that he had 16,000 pounds available on his card and wanted 75¢ per pound. During the introduction between Mr. Nifong and Mr. Collins on October 28th, Nifong did not ask Mr. Collins to show any tobacco marketing card; nor did Nifong request that Collins give him a tobacco marketing card. Collins — not Mr. Nifong — initiated the conversation regarding tobacco

marketing cards. "Undercover Agent Collins then gave Nifong the Jim Barr marketing card and told him to use it." Moreover, the next day Collins dropped his price per pound from 75¢ to 55¢ in order to facilitate sales on the card. Collins placed the two tobacco marketing cards in Mr. Nifong's possession and then closely regulated which card tobacco would be sold on and how much of the remaining poundage per card would be retained. Following tobacco sales conducted at Grower's Warehouse, Collins collected tobacco sale bills and Grower's Warehouse checks made payable to James Collins.

The conversations between Collins and Mr. Nifong concerning the effect of using Collins' marketing cards

focused on directions and prohibitions printed on the card noticed two "farm operator" to whom the card was issued. Mr. Nifong was not the "farm operator" to whom the administrative notices and regulations were directed on the marketing cards. Rather the purported "farm operator" who owned, possessed and controlled the use of the two marketing cards was James Collins, who was acting in an undercover capacity as a farmer.

At no time during the 1981 tobacco sales season did Collins reveal to Nifong that he was a criminal investigator or undercover federal agent. By November 10, 1981 Collins had retrieved his fabricated tobacco

marketing cards from Grower's Warehouse and endorsed and negotiated the Grower's Warehouse checks, and then departed thanking Mr. Nifong for all his assistance in obtaining Christmas money. Mr. Collins reappeared next Spring at Mr. Nifong's farm to tell him that he was going to be indicted for federal crimes.

ARGUMENT

A. The actions of an undercover agent of the United States Department of Agricultural, who provided a tobaccc farmer with counterfeit marketing cards and then told the farmer to sell the tobacco by using the cards, unlawfully contrived a situation for prosecuting the farmer under 18 U.S.C. 1001 either as a matter of statutory construction, federal jurisdiction, or due process of law. By rendering a per curiam opinion which speaks only to issues of sufficiency of the evidence and entrapment, the Fourth Circuit has decided this case without determining the central issue brought forward on appeal: namely, whether the government

has artifically manufactured federal jurisdiction for prosecution of Clay Nifong in this case. A proper statutory construction of 18 U.S.C. 1001 to the facts of this case does not authorize a prosecution for a falsity or concealment which an undercover government agent instigated, created, and initiated. There is no federal statute which specifically regulates the conditions of sale of flue-cured tobacco. As the Fourth Circuit observed in another tobacco marketing case, United States v. Winstead, No. 82-5251 (4th Cir. June 1, 1983) "first the mere sale of excess pounds is not illegal, in the ordinary course of things the contrary is true." Id 10.

The burden is on the government to prove a violation of some statute to constitute an offense. The legislative purposes and judicial precedents under 18 U.S.C. 1001 contravene prosecution under this statute where conduct of government agents has created and caused the activity complained of. The manner of deciding cases through traditional entrapment standards is transcended when as here, (1) Agent Collins masqueraded as a destitute tobacco farmer with a marketing card, (2) targeted a farmer with unsold tobacco and, (3) gave him a card and told him to use it, thereby creating an egregious marketing situation leading to a planned statistical

indictment under 18 U.S.C. 1001. The U. S. Department of Agriculture was not created or intended to be a primary criminal investigative body of the federal government. Agents of the Department of Agriculture function to regulate matters and to detect improper practices within the jurisdiction of that department — not to provide and circulate false marketing cards with the purpose to indict those who utilize the cards. Accordingly, 18 U.S.C. 1001 was designed to protect authorized functions of governmental departments and agencies from perversion which might result from on-going deceptive practices. U.S. v. Shanks, 608 F.2d. 73 (3rd Cir. 1979). When government agent Collins, posing as

a farmer, gave Clay Nifong the marketing card and told him to use it, there were no on-going deceptive practices or falsities being participated in by Clay Nifong.

The transcript of trial fully reveals that it was Collins — not Nifong — who initiated the marketing conversations, gave Nifong the cards, and told him to use them. Collins' involvement in the sale of tobacco on the two cards he gave Nifong was undeniably extensive. Collins inducements require analysis by this court on grounds of artificially created federal jurisdiction. This scrutiny must transcend the classical entrapment evaluation, although

petitioner did request a jury instruction on entrapment which was denied and which instruction was later objected to by counsel. Detailed consideration must be given to the proper statutory construction to standards of federal jurisdiction and due process of law.

Both the Fifth Circuit in U.S. v. Perrin, 580 F.2d 730, 737 (5th Cir. 1978) and the Second Circuit in U.S. v. Archer, 486 F.2d 670 (2nd Cir. 1973) have recognized the legitimacy of defenses based upon artificially created federal jurisdiction. In Archer, the government based its federal nexus for prosecution on three interstate phone calls made or received by defendants in furtherance of a

bribery scheme. Calls were initiated by government agents admittedly to form a basis for federal jurisdiction. The Archer court reversed the convictions and dismissed the indictment based upon the contrived federal jurisdiction. In the case at hand, Collins, working for the U.S.D.A. procured two bogus tobacco marketing cards attempting to ensnare someone into using them to obtain a prosecutable situation. Federal jurisdiction was created solely and impermissibly by the activities of Collins in the manner prohibited by the Archer case. There is no suggestion that Clay Nifong would have ever marketed any tobacco outside of his own quota had Collins not appeared flashing

cards and begging for Christmas money. The use of the tobacco marketing cards by Nifong was an event created, encouraged, expected and approved by Collins. Collins, as an agent, was the United States government. No falsity or concealment was perpetrated on the United States Government by Nifong's actions — the government through Collins, knew and controlled every event. To base this prosecution upon 18 U.S.C. 1001 constitutes sham jurisdictional grounds. This statute was intended to detect and deter on-going violations — not to incriminate an innocent farmer through masquerade and deception. Such imposed incrimination violates fundamental principals of due process of law.

B. The per curiam opinion rendered in this case fails to reconcile or distinguish the Nifong prosecution from the decision in U. S. v. Winsted, No. 82-5251 (4th Cir. June 1, 1983). The Fourth Circuit recognized that "The regulations require that excess pounds transactions be approved by the State A.S.C.S. 7 C.F.R. 725.72 (c). No issue was made at trial or on appeal of that requirement and the case was tried solely on the theory of falsely identifying tobacco grown in one county as being from another. In the Nifong prosecution, the government was required to prove beyond a reasonable doubt (1) that A.S.C.S. had not authorized Nifong to sell the number of pounds alleged in

the indictment or (2) to show the county of origin of the tobacco alleged to be sold. The record is totally devoid of any proof of either non-authorization or origin or type of the tobacco represented on the marketing cards.

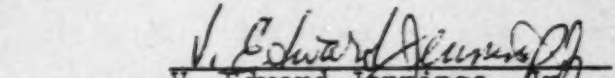
C. The Supreme Court has recognized that a prosecution could result from a situation in which the conduct of federal agents is so overreaching or contrived to the degree that "due process principles would absolutely bar the government from invoking judicial processes to obtain a conviction." United States v. Russell, 411 U.S. 423, 431-32, 93 S.Ct. 1637, 1643, 36 L.Ed. 2d 366 (1973). In this regard, the

Supreme Court has granted a petition for a writ of certiorari to the Fifth Circuit in U. S. v. Roemer, 703 F.2d 805 (5th Cir. 1983) to decide the issues of whether the federal government, either as a matter of statutory construction, federal jurisdiction, due process, or otherwise, should be permitted to rest federal prosecution upon use of the mails entirely concocted and effected by its own agents in their own masquerade. Similarly, this court should reconsider and reevaluate the prosecution of Clay Nifong in the context of the ploys of Jay Bee Collins and the contrived bases of federal jurisdiction under the veil of 18 U.S.C. 1001.

CONCLUSION

Based on the foregoing the petitioner prays that a writ of certiorari issue to the United States Court of Appeals for the Fourth Circuit from this Honorable Court and that the Court stay the mandate in this matter until the decision is rendered.

Respectfully submitted,



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CERTIFICATE OF SERVICE

I hereby certify that I have on this 1st day of November, 1983 mailed three copies of this petition, first class postage prepaid, to each of the following parties:

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Assistant U. S. Attorney
P. O. Box 1858
Greensboro, N. C. 27402

Solicitor General
Department of Justice
Washington, D.C. 20530

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Attorney for Petitioner

IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

UNITED STATES OF AMERICA	:	
V.	:	No. CR-82-101-WS
CLAY NIFONG	:	

The Grand Jury charges:

COUNT ONE

On or about November 3, through November 4, 1981, in the County of Forsyth, in the Middle District of North Carolina, CLAY NIFONG did knowingly and wilfully falsify, conceal, and cover up by a trick, scheme and device, a material fact in a matter within the jurisdiction of the United States Department of Agriculture, an agency of the United States, in that CLAY NIFONG

falsely identified and marketed and caused the false identification and marketing of approximately 14,371 pounds of flue-cured tobacco through the facilities of Grower's Tobacco Warehouse Winston-Salem, North Carolina, by use of a tobacco marketing card issued for Rockingham County, North Carolina, Farm Serial Number G-4223, representing said tobacco as having been produced on said farm, whereas, in truth and fact, as CLAY NIFONG then knew, the said 14,371 pounds of tobacco were not produced on said farm, contrary to the provisions of Title 7, Code of Federal Regulations Part 725, et seq.; in violation of Title 18, United States Code, Section 1001.

COUNT TWO

On or about November 9, 1981, in the County of Forsyth, in the Middle District of North Carolina, CLAY NIFONG did knowingly and wilfully falsify, conceal, and cover up by a trick, scheme and device, a material fact in a matter within the jurisdiction of the United States Department of Agriculture, an agency of the United States, in that CLAY NIFONG falsely identified and marketed and caused the false identification and marketing of approximately 5,498 pounds of flue-cured tobacco through the facilities of Grower's Tobacco Warehouse, Winston-Salem, North Carolina, by use of a tobacco marketing card issued for Rockingham County, North Carolina, Farm

Serial Number G-7044, representing said tobacco as having been produced on said farm, whereas, in truth and fact, as CLAY NIFONG then knew, the said 5,498 pounds of tobacco were not produced on said farm, contrary to the provisions of Title 7, Code of Federal Regulations, Part 725, et seq.; in violation of Title 18, United States Code, Section 1001.

A TRUE BILL:

_____
FOREMAN

_____
UNITED STATES ATTORNEY

UNITED STATES DISTICT COURT
THE MIDDLE DISTRICT OF NORTH CAROLINA
WINSTON-SALEM DIVISION

Docket No. Cr-82-101-01-WS

UNITED STATES OF AMERICA)
)
vs.)
)
CLAY NIFONG)

JUDGMENT AND PROBATION/COMMITMENT ORDER

Sept. 17, 1982

PLEA NOT GUILTY

VERDICT OF GUILTY

GUILTY, as charged in Counts 1 and 2 of an indictment filed August 30, 1982

Defendant has been convicted as charged of the offenses of knowingly and willfully falsifying, concealing,

and covering up by trick, scheme and device, material facts in matters within the jurisdiction of the United States Department of Agriculture, an agency of the United States, in that he falsely identified and marketed, and caused false identification and marketing of flue-cured tobacco, in violation of 18 U.S.C. 1001, as charged in Counts 1 and 2 of an indictment filed August 30, 1982, consolidated for entry of judgment.

The court asked whether defendant had anything to say why judgment should not be pronounced. Because no sufficient cause to the contrary was shown, or appeared to the court, the court adjudged the defendant guilty as charged and convicted and ordered that

the defendant is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of eighteen (18) months, and he is ordered to pay a fine of $2,500.00.

IT IS FURTHER ORDERED that, pursuant to the provisions of 18 U.S.C. 3651, the defendant be confined in a jail-type institution for a period of sixty (60) days, and the execution of the remainder of the sentence of imprisonment be suspended and the defendant placed on probation for a period of five (5) years from the date of completion of the jail-type sentence.

IT IS FURTHER ORDERED that the defendant report to the United States

Marshal in Greensboro on November 15, 1982 at 12:00 Noon.

IT IS FURTHER ORDERED that the indictment filed June 29, 1982 be and the same is hereby dismissed.

A special condition of probation is that said $2,500.00 fine be paid within ten (10) days from this date.

Teste:

_____
Carmon J. Stuart, Clerk

By: _____
Georgia E. Taylor, Deputy Clerk

Signed By:
U. S. District Judge _____
Richard C. Erwin

Date September 21, 1982

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

No. 82-5273

UNITED STATES OF AMERICA,

Appellee

v.

CLAY NIFONG,

Appellant

Appeal from the United States District Court for the Middle District of North Carolina, at Winston-Salem. Richard C. Erwin, District Judge.

Argued June 10, 1983
Decided August 18, 1983

Before WINTER, Chief Judge, WIDENER, Circuit Judge, and BUTZNER, Senior Circuit Judge.

V. Edward Jennings, Jr. and Gregory W. Schiro for Appellant; Robert H. Edmunds, Jr., Assistant United States Attorney (Kenneth W. McAllister, United States Attorney, Becky M. Strickland, Paralegal Specialist, on brief) for Appellee.

PER CURIAM:

Clay Nifong, the defendant, was indicted on two counts of falsely identifying the origin of flue-cured tobacco, in violation of 18 U.S.C. § 1001, by using tobacco marketing cards issued to two Rockingham County, North Carolina farms which were not the source of tobacco, contrary to

7 C.F.R. Part 725 et seq. [1] The case was tried to a jury, which convicted the defendant of both counts. The

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1. Section 1001 of 18 U.S.C. provides:

> Whoever, in any matter within the jurisdiction of any department or agency of the United States, knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both.

For an analysis of the elements of this offense, see United States v. Race, 632 F.2d 1114, 1116 (4th Cir. 1980).

7 C.F.R. § 725.91(a) provides in pertinent part:

(Each . . .marketing of tobacco . . . shall be identified by a marketing card . . .issued for the farm . . ."

defendant has appealed, claiming, among other things, that he was entrapped and that there was an insufficiency of evidence to support his conviction. We affirm.

At the defendant's trial, Special Agent Jay Bee Collins of the Office of Inspector General in the United States Department of Agriculture testified to the following account of events. In fall 1981, Agents Collins and Dayo began an undercover investigation of the tobacco market at Grower's Tobacco Warehouse (Grower's) in Winston-Salem, North Carolina. The agents obtained two farm marketing cards for flue-cured tobacco from the North Carolina Agricultural Stabilization and Conservation Service. One card was issued in

the pseudonym James Collins for a fictitious Rockingham County, North Carolina farm (No. G7044), showing 110% of quota as 10,101 lbs. The other card was issued in the pseudonym Jim Barr for a fictitious Rockingham County farm (No. G4223), with 110% quota of 16,457 lbs. The Barr card showed James Collins a tenant with a right to 100% of the tobacco represented by the card. Armed with these marketing cards, audio monitoring and recording equipment, and some tobacco bought from the Flue-Cured Stabilization Conservation Co-Op, Agents Collins and Dayo, posing as farmers, visited Grower's to investigate the tobacco market there.

After the agents sold some of the government's tobacco on their cards to establish themselves as legitimate tobacco producers, Collins engaged Grower's employee, John Sparger, in a discussion, on the warehouse floor. Collins told Sparger that he had sold most of his tobacco and that he wanted to find someone interested in using the remaining unused quota shown in his card. Sparger walked to another part of the warehouse, within view of Collins, where he spoke to the defendant. Sparger and the defendant both returned to Collins, and the defendant introduced himself as Clay Nifong.

Collins explained his situation to the defendant: the extra unused quota of flue-cured tobacco on his farm marketing card and his desire to sell the use of his card for 75 cents per pound, but for no less than 60 cents per pound. The defendant said that he would act as middleman and arrange a deal for Collins, but insisted that Collins and the other farmer would not be known to each other.

The defendant asked Collins for the marketing card, and Collins gave him the card issued to Jim Barr. The defendant requested that Collins leave the card with him for a few days and come by to pick up a check. They would

then go to the bank to cash the check so that Collins could get his share. In reply to the defendant's inquiry concerning how much of the unused quota he could use, Collins suggested that he leave some pounds on the card lest the Agricultural Stabilization and Conversation Service become suspicious.

Agent Collins returned to Grower's the next day to pick up his check, but the defendant told Collins that he would need a few more days. When Collins expressed some doubt about the defendant's ability to put together a deal, the defendant insisted several times that he could manage it. The

defendant complained of difficulty in finding a buyer at 60 cents per pound because of falling tobacco prices, but assured Collins that he would go no lower than 55 cents per pound.

On November 3, Agent Collins returned to pick up a check and close his deal with the defendant. The defendant took Collins to the bank in his pick-up truck. On the seat of the truck were four bills of sale and four Grower's Warehouse checks, which the defendant asked Collins to endorse, it being remembered that Collins was the tenant on the Barr card. The defendant explained that he was able to get only 58 cents per pound, and that one of

the four checks represented Collin's share. The defendant took the other three checks into the bank to cash them. While the defendant was in the bank, Collins calculated his share and found that he was entitled to more money. The defendant paid the difference to Collins in cash, and assured Collins that he would do everything he could to get 65 cents per pound for the balance of the card.

On November 6, Collins again met the defendant to pick up a check for the sale of the remaining tobacco quota on the Jim Barr card. Collins and the defendant traveled to the bank, where Collins endorsed two checks in his

pseudonym James Collins. Two corresponding bills of sale for November 4, 1981 show Jim Barr as seller, and the Jim Barr card shows a reduction in quota corresponding to the poundage sold on the bills of sale.

After traveling to the bank, the defendant paid Collins his share in cash. That same morning, the defendant asked about the James Collins card and how much of its quota was available for sale. The defendant returned the Barr card and asked for the Collins card. Collins gave him the other card and told him not to zero it out, to leave a few hundred pounds on the card. The defendant said he would try to get 60 cents per pound for the quota on the Collins card.

Agent Collins returned to Grower's once again on November 10, when he met the defendant and traveled with him to a bank. Collins endorsed two Grower's Warehouse checks for sales made by "James Collins" on the Collins card. The Collins card shows sales on November 9 of 5,498 lbs., which corresponds exactly to the amount of tobacco sold on the two bills of sale by James Collins for that date. The defendant paid Collins his share in cash and returned the Collins card.

During his discussions with the defendant, Collins carried a radio, which transmitted their conversations to a receiver and tape recorder located

nearby. The prosecution introduced the tapes of the conversations into evidence, and played them for the jury, which also had a chance to read transcripts prepared by Collins.

The gist of the offenses with which the defendant was charged is that he sold tobacco on the Barr and Collins allotment cards which was not grown on the farms represented by those cards, that is to say, he falsely identified the tobacco sold as being grown on the farms represented by the Barr and Collins cards when in fact it was not.

From the statement of facts above, it is at once apparent that there was ample evidence for the jury to find that the defendant committed the

offenses with which he was charged. The tobacco sold on those cards could not have come from the farms identified on the cards for the farms were non-existent. The defendant received the proceeds from the sales and divided them with agent Collins. While no witness who testified actually saw the defendant make the sales, the sales were indicated on the allotment cards in the possession of the defendant and which he returned to agent Collins.

The only other argument of the defendant which merits particular attention is that he was entrapped as a matter of law or was entitled to an instruction on entrapment.

Our disposition of this claim is governed by United States v. DeVore, 423 F.2d 1069 (4th Cir. 1970).

The defendant claims that the government proved no predisposition of him to commit the offense with which he was charged and thus any solicitation on the part of the government amounts at the least to a factual matter which should have been submitted to the jury.

While the defense of entrapment rests on the premise that the purpose of law enforcement is the prevention not the manufacture of crime, in fulfilling this purpose the government may utilize stealth and deception so long as these strategies do not induce an otherwise innocent person to commit

a crime. But the government may not implant a criminal disposition into the mind of an innocent person. Devore p. 1070-1071. To decide as a matter of law that there has been entrapment, the government must be guilty of such excessive behavior that the behavior must overcome the will of a reasonably firm person. If there is only solicitation, the providing of opportunity, the defendant is not entitled to a jury instruction on the issue. DeVore p. 1072.

In the first place, the proof of predisposition to commit the crime is not necessary. See DeVore p. 1072; Newman v. United States, 299 Fed. 128, 132 (4th Cir. 1924). Even more

importantly, there was no proof of any excessive behavior on the part of the government. The government did no more than offer the defendant the opportunity to commit the crime. The agent provided the defendant with marketing cards. The defendant did not have to use them, and indeed no motive for the defendant to use them was offered other than the profit motive, which, of course, inheres in almost every illegal sale. The only evidence mentioned by the defendant is that the agent Collins represented himself to be down and out in that he had produced a poor tobacco crop and was in need of money for Christmas. We do not believe that this representation of

the government's agent to defendant was so inducive that a reasonably firm person should not have rejected it, this taking the case most favorably to the defendant. Thus, the defendant was not entitled to a jury instruction on the issue of entrapment, and it necessarily follows that he was not entitled to a judgment of acquittal on that point.

We have considered the remaining assignments of error and are of opinion they are without merit.

The judgment of conviction is accordingly

AFFIRMED.

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 82-5273

UNITED STATES OF AMERICA

Appellee

v.

CLAY NIFONG

Appellant

O R D E R

There having been no request for a poll of the court on the petition for rehearing en banc, it is accordingly ADJUDGED and ORDER that the petition shall be, and it hereby is, denied.

The panel has considered the petition for rehearing and is of opinion it is without merit.

It is accordingly ADJUDGED and ORDERED that the petition shall be, and it hereby is, denied.

With the concurrences of Judge Winter and Judge Butzner.

For the Court

Filed: September 12, 1983